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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL JESSE FELIX, JR.,

Defendant and Appellant.

B210054

(Los Angeles County  
Super. Ct. No. VA097129)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dewey Lawes Falcone, Judge. Affirmed.

Kim Malcheski, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Sarah J. Farhat and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Manuel Jesse Felix, Jr. appeals from his conviction of one count of murder in the second degree (Pen. Code, § 187, subd. (a)). Appellant argues that the trial court's admission of evidence of prior bad acts was reversible error violating Evidence Code sections 1101, 1109, and 352,<sup>1</sup> and was inadmissible hearsay. He also contends the trial court committed reversible error by denying his motion to admit evidence that he claims was relevant to show his state of mind.

Finding no prejudicial error, we affirm the judgment.

### **FACTUAL AND PROCEDURAL SUMMARY**

Because appellant does not challenge the sufficiency of the evidence to support his conviction, we provide this brief summary of the facts underlying the offense. (*People v. Ghent* (1987) 43 Cal.3d 739, 748.)

The evidence at trial showed that appellant and the victim, Cintia Montes, were married and lived together on the same property as appellant's parents. Cintia moved out in August of 2006. Appellant, who worked as a security guard and carried a firearm when off-duty, believed that Cintia was seeing other men. Approximately a month after Cintia moved out, appellant waited for her at a bus stop near her work. He was carrying a backpack containing his handgun and other security guard equipment. Cintia drove appellant to his home and they argued while the car was parked in the driveway. Cintia told appellant that if he did not get out of the car, she was going to honk the horn until appellant's parents came out. Appellant pulled a gun out of his backpack, and Cintia began to scream. Appellant's parents heard the honking of a car horn followed by four to five gunshots in quick succession. Appellant exited Cintia's vehicle holding a gun, and appeared to be in a state of shock. He was soon arrested and admitted to officers that he had killed Cintia out of jealousy and because he felt she was "playing" with his feelings.

Appellant was charged by information with murder (Pen. Code, § 187, subd. (a)). The information alleged that appellant used and discharged a firearm within the meaning of Penal Code section 12022.53, subdivisions (b), (c), and (d). Appellant pled not guilty,

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<sup>1</sup> All unspecified statutory references are to the Evidence Code.

maintaining at trial that the killing was not premeditated or deliberate, but was a crime of passion and compulsion precipitated by a major depressive episode and drug use. Over appellant's objection, the trial court admitted testimony from Cintia's friend, Carmina Magallanes, that Cintia told her appellant had threatened to kill Cintia with a gun one month before and again one week before the shootings. Appellant's statement at a police interview describing a prior threat to Cintia with a gun also was admitted over his objection. Text messages retrieved from Cintia's mobile phone that purportedly showed her romantic involvement with a third party were not admitted into evidence, although the court did admit appellant's statement to police that his son saw Cintia kissing and hugging another man.

Appellant was convicted of second degree murder. (Pen. Code, § 187, subd. (a).) The jury found firearm allegations to be true (Pen. Code, § 12022.53, subds. (b)-(d).) The trial court sentenced appellant to 40 years to life. He timely appeals from the judgment of conviction.

## **DISCUSSION**

### **I**

Appellant argues that Magallanes's testimony that he threatened to kill Cintia with a gun on two prior occasions was inadmissible evidence of prior bad acts that violated sections 1101, 1109, and 352. He also argues that the trial court erred in admitting a statement appellant made to police about a threat he made to Cintia with a gun.<sup>2</sup> We review the trial court's rulings concerning the admissibility of evidence for an abuse of discretion. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 717.)

Section 1101 states, in pertinent part, "(a) Except as provided in this section . . . evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion. [¶]"

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<sup>2</sup> Appellant claims that other parts of Magallanes's testimony also qualify as prior bad acts which should not have been admitted. Because he did not object to their introduction, his claim is forfeited on appeal. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive [or] intent . . . ) other than his or her disposition to commit such an act.” Section 1109, subdivision (a)(1) provides that “[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.” Subject to section 352, section 1109 allows the admission of such evidence to prove the defendant had a propensity to commit domestic violence. (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1114.) Section 352 provides that “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

There is no dispute that appellant shot and killed Cintia. The issue was his mental state at the time. Appellant’s theory at trial was that the killing was a crime of passion rather than premeditated murder. Magallanes testified that a month before the shooting, appellant pointed a gun at Cintia and told her that “if she was ever with somebody, he would kill her.” She said that a week before the shooting appellant again pointed a gun at Cintia, saying that “if she was going to leave him, that she was going to be with nobody if it wasn’t him.” Magallanes testified that Cintia was shaken and crying when recounting the threats. Appellant’s prior acts as described by Magallanes were admissible as they were nearly identical to the charged offense; under section 1101 “[t]he least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) Magallanes’s testimony also was properly admitted pursuant to section 1109 to show appellant’s criminal propensity for domestic violence. The trial court found the prior acts qualified as domestic violence under Penal Code section 1370, and were consistent with the conduct on the date of the killing.

Because the evidence of appellant's prior acts of threatening Cintia with a gun was admissible under section 1101, subdivision (b) to prove his premeditated intent to kill and the absence of heat of passion at the time he killed Cintia, it was not made inadmissible by section 1101, subdivision (a). The evidence also was admissible to prove appellant's propensity for domestic violence under section 1109. The trial court gave limiting instructions to the jury concerning the permissible use of the prior bad act evidence, and the jury is presumed to have followed those instructions and not to have used the challenged evidence for impermissible purposes. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) The jury convicted appellant of second degree murder, and thus appears to have credited his theory that the killing was not premeditated or deliberate. The trial court did not abuse its discretion in admitting the evidence under sections 1101 and 1109.

Appellant argues his statement to police about a prior threat to Cintia with a gun should have been excluded pursuant to section 352, contending this evidence was cumulative and highly prejudicial. He also argues the prior threats to Cintia with a gun as related by Magallanes were more prejudicial than probative, and should have been excluded pursuant to section 352 on that basis as well. When reviewing a ruling on a section 352 motion, “[a]ll that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under . . . section 352.” [Citation.]” (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1315.) “[A] trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so.” (*People v. Williams* (1992) 16 Cal.4th 153, 213.) In this case, the record shows that the trial court balanced the probative value of Magallanes's testimony about prior threats against any undue prejudice, considering whether the prior acts were more inflammatory than the charged conduct and the possibility for confusion. (*People v. Rucker, supra*, 126 Cal.App.4th at p. 1119.) Appellant's statement to police describing a prior incident where he pointed a gun at Cintia's head had a tendency in reason to prove malice or intent to kill; that it was somewhat cumulative is not determinative of whether it was unduly prejudicial. (*People v. Williams, supra*, 16 Cal.4th 153, 213.)

Citing *People v. Partida* (2005) 37 Cal.4th 428, 439, appellant urges reversal because “the asserted error in admitting the evidence over his Evidence Code section 352 objection had the additional legal consequence of violating due process.” “To the extent [appellant’s] claim is a constitutional gloss on his trial objection . . . it is without merit because there was no abuse of discretion.” (*People v. Riggs* (2008) 44 Cal.4th 248, 304.) In light of the overwhelming evidence of appellant’s guilt, any constitutional error would be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

## II

In a related claim, appellant contends that Magallanes’s testimony relating Cintia’s description of appellant’s threats should have been excluded as hearsay because it was not admissible pursuant to sections 1370 or 1250, and was admitted in violation of the Sixth Amendment.

The Sixth Amendment’s “Confrontation Clause has no application to [out-of-court nontestimonial statements not subject to cross examination] and therefore permits their admission even if they lack indicia of reliability.” (*Whorton v. Bockting* (2007) 549 U.S. 406, 420.) Testimonial statements are “solemn” affirmations designed primarily to prove or establish some fact; “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” (*Crawford v. Washington* (2004) 541 U.S. 36, 51.) Cintia made the statements to her “very close” friend Magallanes while she “was crying.” Since the statements were nontestimonial, the Sixth Amendment does not apply. (*Ibid.*)

Over appellant’s objection that Magallanes’s testimony about the threats was inadmissible hearsay, the trial court admitted the statements as substantive evidence pursuant to section 1370. Section 1370, subdivision (a) provides in pertinent part that a threat of physical injury is not made inadmissible by the hearsay rule if “(5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.” Magallanes related Cintia’s

statements as a conversation between friends; the record does not show that section 1370 applies.

The trial court also found that the testimony was admissible to show Cintia's state of mind, and was relevant to show why she "left the defendant, that is [why] she was in fear of him, why she separated from the defendant." Section 1250 provides that evidence of a statement of a declarant's then existing state of mind is not made inadmissible by the hearsay rule when the declarant's state of mind is itself at issue in the action, or if the evidence is offered to prove or explain acts or conduct of the declarant. If the declarant's statement directly declares a statement of mind it can be introduced without limitation and is received for the truth of the matter asserted. (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.) But when a statement asserting personal knowledge of a past act of a defendant is introduced to show a victim's state of mind, the jury must be instructed not to consider the statement itself as true, but only as circumstantial evidence of the declarant's state of mind. (*Id.* at p. 390.) Cintia told Magallanes that appellant threatened to kill her at gunpoint on two occasions. The statements were not admitted to show Cintia's state of mind, but for their truth—that appellant had threatened her with a gun. The prosecutor referred to the threats as true in closing argument. The jury instructions did not admonish the jury to receive the statements only to show Cintia's state of mind or explain her conduct, they were offered as proof of motive and intent, and to show appellant's criminal propensity for domestic violence. While the trial court correctly found that the statements qualified as admissible character evidence, they did not fall within an exception to the hearsay rule and their admission was error.

We find the error is not prejudicial because "it is not reasonably probable that a result more favorable to the [appellant] would have been reached" in its absence. (*People v. Watson* (1956) 46 Cal.2d 818, 837.) Appellant's statement to police in which he confessed to prior threats against Cintia with a gun showed the requisite intent to kill required for a finding of second degree murder. Appellant told police he had been thinking of killing Cintia for some time, and brought a gun with him the day of the shooting for that purpose.

### **III**

Appellant contends that the trial court committed reversible error by not admitting text messages from a phone recovered from Cintia's body. Appellant argues the messages were relevant to establish his heat of passion defense because they proved Cintia was having an affair, and also argues they were circumstantial evidence of his state of mind on the day of the shooting. The trial court excluded the messages as irrelevant because there was no evidence that appellant knew about them at the time of the shooting. There was no abuse of discretion. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 681-682.)

### **DISPOSITION**

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.